Joint Committee on Taxation
JCX-4-88
March 16, 1988

H.R. 2792
(Tax Treatment of Indian Fishing Rights)

Scheduled for Mark-up
by the
Subcommittee on Select Revenue Measures
of the
Committee on Ways and Means
March 17, 1988

H.R. 2792 would exempt from Federal and State taxes income earned by Indians from fishing activities protected by treaties, executive orders, or Federal statutes.[1] The bill was favorably reported by the Committee on Interior and Insular Affairs on September 21, 1987 (H. Rpt. 100-312, Part 1). The Subcommittee on Select Revenue Measures of the Committee on Ways and Means held a hearing on H.R. 2792 on December 14, 1987.[2] At this hearing, the Administration indicated its support for the bill. The following is an overview of present law, the provisions of H.R. 2792, and possible options for mark-up consideration.

Present Law

In ordinary matters not governed by treaties or remedial legislation, Indians are subject to the payment of Federal income taxes as are other citizens.[3] But in some situations, specific provisions in treaties or statutes have been

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[1] H.R. 2792 was introduced by Messrs. Lowry, Matsui, Ford of Tennessee, Russo, Chandler, and others. The bill was jointly referred to the Committee on Ways and Means and the Committee on Interior and Insular Affairs.

[2] For a description of the bill and a discussion of issues raised by the bill, see Joint Committee on Taxation, Description of H.R. 2792, Relating to Tax Treatment of Indian Fishing Rights (JCX-24-87), December 11, 1987.

[3] Indians and their property are exempt from State taxation within their reservations, unless Congress clearly manifests its consent to such taxation. However, income earned outside the reservation is generally subject to State taxation, unless Federal law otherwise provides for an exemption.

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construed to exclude from Federal taxation certain income derived from Indian lands held in trust by the United States. Income derived by Indians from individual or tribal-owned property has, in other situations, been held to be subject to Federal income tax.

Questions have been raised whether a special tax rule should apply to income earned by members of certain Indian tribes from the exercise of fishing rights guaranteed by treaties, Federal statutes, and executive orders. The treaties at issue, most of which were entered into in the latter half of the 19th Century before adoption of the 16th Amendment pursuant to which the Federal income tax is imposed, generally secure to Indians who had relinquished all rights to large areas of land (mostly in the West and Great Lakes regions) the exclusive rights to fish on reservation property and the shared rights to fish off-reservation at "all usual and accustomed grounds and stations."[4]

The fishing rights reserved to Indians include the right to fish for subsistence as well as for commercial purposes. In addition, certain hunting, gathering, and grazing activities are also secured to Indians by treaties, Federal statutes, and executive orders.

The treaties, Federal statutes, and executive orders that reserve fishing rights to Indians do not contain provisions that specifically address the issue of Federal income taxation of Indian fishing activities, and the Supreme Court has not yet ruled on this particular question.[5] As a consequence, contrary positions have been adopted within the Federal Government on this issue. On the one hand, the Department of Interior has taken the position that treaty or statutory language that reserves fishing rights to Indians precludes Federal taxation of income derived from the exercise of those rights, because otherwise the tax, in essence, would be a charge imposed upon Indians for exercising their fishing rights that was not contemplated at the time the rights were reserved. The Treasury Department, on the other hand, has attempted to collect income taxes on

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4 Some of these treaties secure to Indian tribes the opportunity to catch up to 50 percent of the harvestable numbers of fish passing through their traditional fishing areas.

5 In three cases, however, the Tax Court has held that income derived from the exercise of Indian fishing rights is subject to Federal income tax. Peterson Estate v. Comm'r, 90 T.C. No. 18 (1988); Earl v. Comm'r, 78 T.C. 1014 (1982); Strom v. Comm'r, 6 T.C. 621 (1946), aff'd per curiam, 158 F. 2d 520 (9th Cir. 1947).

income earned by tribal fishermen from commercial fishing operations, on the ground that the fishing rights reserved to Indians do not encompass a right to be free from taxation on the profits from commercial fishing absent express exemptive language in the operative treaty or statute.

Explanation of H.R. 2792

H.R. 2792, as reported by the Committee on Interior and Insular Affairs, would provide that all income derived by an Indian from "the exercise of rights" to fish secured by any treaty, executive order, or Federal statutes, is exempt from all Federal and State taxes (e.g., regular Federal income and Social Security taxes).[6] Fishing is defined to include not only actual harvesting of fish, but also the processing and preparation of fish for consumption.

The report of the Committee on Interior and Insular Affairs states that the term "exercise of rights" is to be construed broadly to apply both to income of individual Indians directly involved in fishing activities and also to the income of Indian-owned corporations, partnerships, or other entities engaged in the fishing business, whether or not employees of the business are Indians. Additionally, the exemption applies to Indians deriving income from employment in a fishing business owned by another Indian.

The bill further applies to income derived from both on-reservation and certain off-reservation fishing activities. Thus, the bill would provide an exception to the general present-law rule that States may tax off-reservation income.

Effective date.--The provisions of the bill would be effective upon enactment, and would apply prospectively as well as retroactively to all periods for which the period of limitations for assessment of tax remains open.

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[6] Exemption from these taxes could have the corollary effect of making certain Indians ineligible for the earned income credit and for social security benefits. Additionally, the unemployment insurance taxes are based on covered wages. It is unclear whether exempt income from fishing rights would be wages subject to this tax. If the wages were not subject to tax, Indians receiving exempt income could be ineligible for unemployment compensation benefits.

Options for Subcommittee Consideration

Possible Resolution of Federal Tax Issues

Option (1).--Take no action, thereby leaving the courts to resolve the issue of taxation of income earned by Indians from fishing (and other activities) protected by treaties, statutes, and executive orders.

Option (2).--Exempt from Federal taxation income earned in prior years by Indians from protected fishing activities, but leave the courts to resolve tax disputes with respect to income earned in present and future taxable years.

Option (3).--Address Federal taxation issues for past and future years, with the following modifications to H.R. 2792:

A. Scope of Exempt Activities

(i) Clarify that only fishing rights currently in existence would be covered by the exemption provided in the bill.

(ii) Clarify that only tribes with protected fishing rights are included within the scope of the bill and that only members of those tribes are included within the definition of Indian.

B. Rules for Individual Indians

(i) Clarify that the tax-exemption extends to SECA and the employee share of FICA taxes, as well as income taxes.

(ii) Clarify in committee report language that the committee intends that tribal membership for purposes of the bill should not be significantly expanded by tribes to cover individuals who do not qualify as tribal members under current rules.

C. Rules for Indian-Owned Entities (e.g., partnerships, cooperatives, and corporations)

(i) Clarify that income earned by an Indian-owned entity from protected fishing activities would be exempt from tax only if the entity is 100-percent owned by qualified Indians (and their spouses) and only when tribal members materially participate in the operation of the entity.

(ii) Clarify that income of an Indian-owned entity engaged in activities other than harvesting of fish (e.g., processing or preparation of fish) is exempt only if at least 90 percent of the gross receipts of the entity are derived from the exercise of fishing rights protected by treaty, statute, or executive order. An Indian-owned entity engaged in harvesting of fish would be required to allocate income and expenses between its harvesting activities that are protected by treaty, statute, or executive order and those harvesting activities that are not so protected.

(iii) Clarify that the exemption from tax does not extend to taxes imposed on Indian employers (e.g., FICA and FUTA) with respect to non-Indian employees.

(iv) Clarify that entities owned by tribal governments are subject to the same rules regarding FICA and FUTA taxes as are entities owned by tribal members.

Possible Resolution of State and Local Tax Issues

Option (1).-- Take no action on State and local tax issues.

Option (2).-- Provide exemptions from State and local taxes that parallel those for Federal taxes.